

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GARY VAN WAEYENBERGHE,)	
)	
Petitioner)	
)	
vs.)	CAUSE NO. 3:08-CV-456 RM
)	(arising out of 3:04-CR-87(01) RM)
UNITED STATES OF AMERICA,)	
)	
Respondent)	

OPINION AND ORDER

On October 13, 2009, the court denied Gary Van Waeyenberghe's 28 U.S.C. § 2255 petition to vacate, set aside, or correct sentence on account of ineffective assistance of counsel. Mr. Van Waeyenberghe has now filed a notice of appeal and motions for a certificate of appealability and leave to proceed *in forma pauperis*. For the reasons stated, these motions are DENIED.

To obtain a certificate of appealability Mr. Van Waeyenberghe must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). This means he must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Miller-El v. Cockrell, 537 U.S. at 336. The court has reviewed the claims made in Mr. Van Waeyenberghe's petition and has made a general assessment of their merits, *see*

id., and finds that Mr. Van Waeyenberghe is far from meeting his burden. The court's opinion and order denying Mr. Van Waeyenberghe's § 2255 petition [Doc. No. 99] found that Mr. Van Waeyenberghe's counsel's performance was, without doubt, objectively reasonable and in no way prejudicial to Mr. Van Waeyenberghe's defense. See Strickland v. Washington, 466 U.S. 668, 687 (1984). The issues Mr. Van Waeyenberghe raised deserve no encouragement to proceed further and his motion for a certificate of appealability is denied.

An appeal may not be taken *in forma pauperis* if it is not taken in good faith. 28 U.S.C. § 1915(a)(3). The appointment of counsel during previous proceedings doesn't automatically entitle Mr. Van Waeyenberghe to proceed *in forma pauperis* on appeal. See FED. R. APPELLATE PROC. 24(a)(3)(A). On the other hand, the denial of a certificate of appealability doesn't automatically require the denial of a motion to proceed *in forma pauperis*. Walker v. O'Brien, 216 F.3d 626, 631-32 (7th Cir. 2000). Rather, the court must decide whether "a reasonable person could suppose that the appeal has some merit." Id. at 632. For the reasons stated in its denial of Mr. Van Waeyenberghe's § 2255 petition [Doc. No. 99], any appeal would not be taken in good faith, and the motion to proceed *in forma pauperis* is denied.

In summary,

- 1) Mr. Van Waeyenberghe's motion for a certificate of appealability [Doc. No. 104] is DENIED.
- 2) Mr. Van Waeyenberghe's motion for leave to proceed *in forma pauperis* [Doc. No. 103] is DENIED.

SO ORDERED.

ENTERED: December 10, 2009

/s/ Robert L. Miller, Jr.
Chief Judge
United States District Court

cc: G. Van Waeyenberghe
B. Brooke
United States Court of Appeals